



Commonwealth of Massachusetts

State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-98-2*

FACTS:

You are the Chief of the Administrative Law Division ("Division Chief") of the Office of the Attorney General ("OAG"). Your official duties include advising counsel for all state agencies about legal issues that are or may be the subject of litigation, supervising other assistant attorneys general and special assistant attorneys general in the handling of litigation on behalf of state agencies, and directly handling such litigation yourself. Carrying out these duties often involves preparing educational materials and conducting training sessions for assistant attorneys general and agency counsel on legal issues related to government practice, drafting and reviewing proposed regulations and legislation, and recruiting and interviewing candidates for positions in the Division and the OAG in general.

Since August 1997, you have also been serving as Chair of the Public Law Section ("Section Chair") of the Massachusetts Bar Association, a private organization that supports the activities of lawyers within the Commonwealth. The mission of the Section is to promote congeniality among public and private sector lawyers, provide a forum for discussion of public law issues and ethical concerns, develop continuing legal education programs and materials, and promote public sector law as a career.

You report that your duties as Section Chair substantially overlap with your duties as Division Chief, and that it is difficult for you to confine your activities as Section Chair strictly to hours outside of your normal working hours as Division Chief. As a result, you requested the Attorney General's permission to spend approximately three hours per week on Section activities, and to use the Office's telephones, fax machine and word processor for such activities. The Attorney General acknowledged that your participation as Section Chair "reasonably fits within your area of official responsibilities as part of your role" as Division Chief. He granted your request in writing, allowing you to participate in Section Chair activities "to the extent it is necessary" during your normal working hours, with the proviso that you must provide advance notice to the OAG if the Section is going to take a public position on an issue of legal policy that differs from the position of the OAG. In such circumstances, the Attorney General concluded that it may be necessary for you to recuse yourself from further participation as Section Chair in the matter.

QUESTION:

Does G. L. c. 268A, §23(b)(2) permit you, as Division Chief, to use state time and state resources, such as the telephones, fax machine, and word processor, to perform your duties as Chair of the Public Law Section of the Massachusetts Bar Association when your appointing authority has determined in writing that your duties as Section Chair reasonably fit within your official state duties and has also approved your use of such state time and resources to the extent it is necessary?

ANSWER:

Section 23(b)(2) of G. L. c. 268A will permit you to use state time and resources, to the extent necessary, to perform those duties as Chair of the Public Law Section of the Massachusetts Bar Association that are (i) in furtherance of the public interest; (ii) interconnected with your duties as Division Chief; and (iii) not used toward partisan political ends; provided that you obtain, in advance, your appointing authority's written approval of your proposed use of state time and resources and such written approval specifies that your use of state time and resources satisfies these three conditions.

DISCUSSION:

As an employee of the Attorney General's Office, you are a state employee^{1/} for purposes of the conflict of interest law. As such, you are subject to, among other sections of the conflict law, G. L. c. 268A, §23(b)(2) which prohibits a public employee from using or attempting "to use his official position to secure for himself or others *unwarranted* privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals." (emphasis added).

The term "unwarranted" is not defined in c. 268A.^{2/} As a result, we have noted that we may apply common experience and common sense in interpreting such words as they appear in the conflict law. *EC-COI-87-37*; *EC-COI-95-5*. In common usage "unwarranted" means "lacking adequate or official support"^{3/} or "having no justification; groundless."^{4/5/}

We previously have concluded that the use of public resources by public employees for *personal* purposes constitutes an *unwarranted* privilege not available to similarly situated individuals. *EC-COI-95-5*. "Section 23(b)(2) dictates that the use of public time and resources must be limited to serving the public rather than private purposes." *Id.* See also *EC-COI-92-4*; *91-6* (public officials may not use public time, personnel, facilities, equipment (telephones, copiers, fax machines), titles, etc. in conducting private business).^{6/}

Your proposed use of state time and resources for Section activities does not appear to be for personal purposes. The issue here, rather, is whether the use of state resources and time in support of your Section activities is warranted, based upon the authorization you have already received. In circumstances similar to yours, we advised the Commissioner of the Department of Corrections, in *EC-COI-84-70*, that he could use Department staff and resources to process registration information in connection with a national conference on parole and probation, which was sponsored by a private, non-profit organization in which the Commissioner served as an officer, provided that the use of such resources was:

1. in furtherance of the public interest in general, rather than in pursuit of private gain (either of an individual or a particular private interest group);
2. interconnected with the business of that department of state government . . . ;^{7/}
3. not used toward partisan political ends; and
4. the state employee's appointing official approves the use of state resources for that purpose.

EC-COI-84-70. We further stated, "This last condition is critical. It ensures that a disinterested, accountable public official is making a judgment that there is an appropriate and not 'unwarranted' use of state resources."^{8/} *Id.*

We continue to believe that the above-described four conditions must be satisfied in order to determine that the use of public time or resources to support private organizations and related activities is warranted for purposes of §23(b)(2). We clarify that the public employee must obtain, in advance, his appointing authority's written approval of the proposed use of public time and resources and such written approval must specify that the public employee's proposed use of public time and resources satisfies each of the first three conditions.^{9/} Thus, provided that you and your appointing authority satisfy all these conditions, you may, to the extent necessary, use state time and resources to perform those Section activities interconnected with your duties as Division Chief.

DATE AUTHORIZED: May 12, 1998

*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

^{1/}"State employee," a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, . . . G. L. c. 268A, §1(q).

^{2/}The legislative history concerning "unwarranted" as it appears in the conflict law does not elucidate its meaning.

^{3/}*Webster's Third New International Dictionary* (1964).

^{4/}*The American Heritage Dictionary, Second College Edition* (1985).

^{5/}The phrase "use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions" has been part of G. L. c. 268A since it was first enacted in its general current form. See St. 1962, c. 779, §1; St. 1975, c. 508; St. 1982, c. 612, §14; St. 1986, c. 12, §2. For purposes of this opinion, we assume that your use of state time and resources for your Section Chief duties would necessarily involve "privileges or exemptions of substantial value" because the amount of state time and resources you plan to devote to Section Chair activities would constitute something of "substantial value" under the conflict law. See e.g., *PEL 92-3*; *EC-COI-93-14*.

^{6/}See also *EC-COI-81-88* (state senator's allowing a non-profit organization to use his state office space, telephones and other facilities constituted using his official position to secure an "unwarranted privilege" when such an organization would be receiving something not generally available to private interest groups); *EC-COI-82-112* (state representative who leased a word processor using personal funds for use in his state office may not use the word processor for purely personal or campaign-related purposes as long as it remains in his office because the use of state office space, electricity, lighting, etc. which accompanied its use for such purposes is an "unwarranted privilege arising out of [his] official position"); *PEL 92-3* (recreation department director who directed city employees to devote approximately 100 hours of city time towards the administrative needs of a non-profit unincorporated association that were unrelated to city business extended an unwarranted privilege of substantial value to that association).

^{7/}We noted that the exchange of ideas and knowledge, the development of programs, and public education as to the needs and goals of the corrections process were among the Commissioner's statutory duties.

^{8/}We also noted, however, that nothing in our opinion precluded the application of other statutes or regulations dealing with the use of state facilities or supplies.

^{9/}It is the appointing authority's responsibility, in the first instance, to determine whether he has legal authority to make such an approval. We have indicated that in certain circumstances we will defer to official personnel policy decisions in determining what is a warranted use of an official position. See e.g., *EC-COI-86-17* (as long as the public authority retains the discretion to determine the compensation package for its employees, the distribution of a free pass would not constitute the granting of an unwarranted privilege to its employees). The head of a public agency does not, however, have unlimited discretion. "[P]ublic resources may only be allocated for public business, and may not be utilized to address individual concerns of public employees, even if those concerns are public-spirited in nature."

PEL 92-3. Compare EC-COI-84-128 (Secretary of Executive Office of Public Safety's participation in raising funds for Governor's prevention of drug and alcohol abuse campaign can reasonably be seen as part of the Secretary's official duties and lending the prestige of his office will not inure to benefit of a private individual, but rather to a state-sponsored project which will serve the public interest). See also EC-COI-88-17 (we will customarily defer to the appointing official's discretion with respect to determining acts done within the proper discharge of official duties under §4(c), although an appointing official's discretion under §4 is not unlimited; in this opinion, we disagreed with the appointing official's determination of the employee's official responsibilities); EC-COI-83-20; 83-137.